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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LI HONG ZHANG,

Plaintiff and Respondent,

v.

DAVID CHEUNG,

Defendant and Appellant.

B282132

(Los Angeles County
Super. Ct. No. BC581493)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Law Office of Adam Dolce and Adam Dolce, for Defendant and Appellant.

Law Offices of Edward C. Ip & Associates, Edward C. Ip and Jenny Zhao, for Plaintiff and Respondent.

Landlord David Cheung appeals a judgment after a jury trial about a commercial leasing transaction. The jury awarded a split decision. Cheung lost almost twice what he won: he won \$16,200 in damages for breach of the lease by tenant Guang Tong, but Tong won \$30,078.85 in damages against Cheung for intentional misrepresentation and negligence. Cheung appeals this loss, as well as an attorney fee award against him. Tong does not appeal. We affirm.

Tong died on December 24, 2017 while this appeal was pending. We substituted Li Hong Zhang, Tong's successor in interest, in his place. The text of this opinion refers to "Tong" rather than "Zhang," however, because Tong was the actor before and during trial.

I

This case was tried to a jury in January 2017. No one retained a trial court reporter. Tong had trial counsel, but Cheung represented himself before and during trial, retaining counsel only on May 8, 2017, during post-judgment proceedings in the trial court.

Without a transcript, we cannot ascertain exactly what happened at trial. A few things are clear. In pleadings, the parties made these allegations. Tong alleged he signed a lease for the rear unit of Cheung's commercial building. Tong aimed to open a new sporting goods store there, but the unit lacked the water and electricity essential for retail operation. Tong alleged Cheung had a practice of tricking potential tenants into leasing that unit and collecting rent until tenants finally discovered that making water and electrical connections to that unit is commercially impractical, and that Tong fell victim to this scheme. Tong stopped paying rent and abandoned the premises.

On March 10, 2015 Cheung served a three-day notice to pay rent or quit, demanding \$9,900 in unpaid rent. Cheung filed a small claims action against Tong. Tong responded with a separate suit against Cheung. The trial court consolidated the two cases and tried them to a jury in January 2017.

On January 31, 2017 the jury returned a special verdict finding in favor of Cheung on his breach of contract cause of action and finding that Cheung suffered \$16,200 in damages. The jury found for Tong on his intentional misrepresentation and negligence claims and awarded him \$30,078.85 in damages for Cheung's intentional misrepresentation. Regarding negligence damages, the jury wrote "see pg. 6" (the page of the special verdict stating Tong's damages for intentional misrepresentation) and "(\$30,078.85)" with the notation "nothing additional."

On February 14, 2017 the trial court entered judgment on the special verdict awarding Cheung \$16,200 against Tong, awarding Tong \$30,078.85 against Cheung, and declaring Tong "the prevailing party with a net monetary recovery of \$13,878.85." Tong moved for an attorney fee award. On June 14, 2017 the trial court filed a minute order granting the motion. The order reduced some of the requested rates and hours requested in the motion and directed Tong's counsel to calculate a new total and submit a proposed order. On June 29, 2017 the trial court filed an order granting the motion and awarding Tong \$50,358.75 in fees plus \$3,433.04 in costs, for a total of \$53,791.79.

On April 17, 2017, Cheung filed a notice of appeal from the judgment (No. B282132). On July 5, 2017 Cheung filed a notice of appeal from the minute order of June 14, 2017 (No. B283686). We consolidated the two appeals.

On August 4, 2017 Cheung filed an objection to a proposed amended judgment submitted by Tong, arguing that Tong had served his proposed order granting the fee motion on Cheung at the wrong address and did not allow Cheung enough time to approve or disapprove it. On August 28, 2017 the trial court vacated the fee order of June 29, 2017 and ordered Tong to resubmit a proposed order after properly serving Cheung. On October 12, 2017 the trial court filed a new order granting the motion for attorney fees, awarding Tong \$50,358.75 in fees plus \$3,433.04 in costs.

II

Cheung's first argument in his opening brief is that no substantial evidence supported the jury verdict against him for intentional misrepresentation. Cheung concedes in reply, however, that it is "especially difficult" to reverse a judgment for want of substantial evidence when, as here, there is no trial transcript. Despite the lack of evidence of the content of trial testimony, however, Cheung persists in arguing that no substantial evidence supported the misrepresentation verdict, citing limitations in Tong's complaint.

We presume the judgment is correct and require Cheung affirmatively to demonstrate error. (*Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 287-288.) Cheung cannot make this showing by noting the factual conciseness of Tong's complaint, because testimony at trial can be (and typically is) far more extensive than allegations stated at the outset of the suit, before discovery. Absent a record, we presume trial testimony supported the misrepresentation claim. (*Ibid.*) Cheung's challenge fails.

Cheung also argues the economic loss rule precludes negligence liability for Tong's economic losses as a matter of law absent any physical injury or property damage. Any error as to negligence could not have been prejudicial. The jury awarded Tong \$30,078.85 in damages for intentional misrepresentation and expressly awarded no additional damages for negligence. Because we affirm the judgment as to intentional misrepresentation, the judgment as to negligence adds nothing. We therefore express no opinion on Cheung's argument regarding the economic loss rule.

III

Cheung also attacks a supposed inconsistency in the jury verdicts. This inconsistency is superficial, not real. The jury found Cheung liable for making a false representation to Tong. The jury likewise rejected Tong's affirmative defense of fraud by finding Tong liable to Cheung for breach of contract. A close look reconciles these results entirely.

A special verdict is inconsistent only if there is no possibility of reconciling its findings with each other. (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1048.) We independently review whether special verdicts are inconsistent. (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 124.)

There is no necessary inconsistency between these verdicts because the supporting elements are different. Tong's fraud defense was specific. The jury instruction required the jury to find Cheung had "represented that water and electricity can easily be obtained by reconnecting to the front tenant's utility line." By contrast, the intentional misrepresentation instruction was general. It merely required the jury to find Cheung had represented "a fact" that was false. "A fact" could be any fact.

There are many fact assertions that might be untrue besides the assertion that “water and electricity can easily be obtained by reconnecting to the front tenant’s utility line.” Consider this hypothetical fact assertion: “You need not install a second water meter to get water service to your rental property.” Or this: “You need not install a second electrical meter to get electricity to your rental property.” Or this: “The Factory Tea bar will allow you to dig up their parking lot to install a structural power line.”

All of these hypothetical fact assertions render the two verdicts consistent: they all differ from the fact assertion that “water and electricity can easily be obtained by reconnecting to the front tenant’s utility line.” The jury logically could have found Cheung stated one of these hypothetical and false fact assertions and therefore could be liable for intentional misrepresentation at the same time the jury found Cheung never said “water and electricity can easily be obtained by reconnecting to the front tenant’s utility line.” The two verdicts are not necessarily inconsistent.

Did the jury actually hear evidence of one of these hypothetical fact assertions? We cannot know because the parties opted to forego a court reporter. There is no record of the evidence at trial. Because the appellant has the burden of proving error, this omission falls against Cheung and dooms his argument about inconsistency.

IV

Cheung also claims the trial court erred in awarding attorney fees against him. This is incorrect. The fee award was proper under any standard of review.

We first address the issue of mootness. Tong argues Cheung’s appeal from the fee order was moot at the time Cheung

filed his appellant's opening brief because the trial court had vacated the appealed order. We reject this argument because we conclude that the order of August 28, 2017 vacating the earlier fee order is void.

Upon the filing of a notice of appeal the trial court loses its subject matter jurisdiction over any matter embraced in or affected by the appeal. (Code Civ. Proc., § 916, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-197.) Any later trial court proceedings on matters embraced in or affected by the appeal are void. (*Varian*, at p. 198.) The order of August 28, 2017 vacating the order of June 29, 2017 therefore is void.

In the trial court, Tong sought an attorney fee award of \$59,754.29. The basis for his request was section 27.6 of the lease, which stated (*italics added*), "In the event of *any litigation* between TENANT and LANDLORD to enforce any provision of this lease or *any right of either party* hereto, the unsuccessful party to such litigation shall pay to the successful party all costs and expenses, including reasonable attorneys' fees, incurred therein. . . ." Cheung opposed the motion and requested an award of his attorney fees incurred in opposing the motion. On June 29, 2017 the trial court granted the motion but reduced the sums to \$50,358.75 in fees plus \$3,433.04 in costs.

Tong's victory fit within the contract language, which granted attorney fees in the event of any litigation between tenant and landlord to enforce "*any right of either party . . .*." The words "any right" encompass Tong's victory, which enforced Tong's right to truthful representations from Cheung. Cheung's argument to the contrary incorrectly narrows the literal meaning of the broad term "any right."

Cheung cites *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, which is inapplicable. The *Canal-Randolph* holding was that a plaintiff may not enforce a contractual attorneys fee provision when the defendant was not a party to the contract. (*Id.* at pp. 485-487.) This holding is not pertinent because Cheung *was* a party to this contract.

Similarly, Cheung's reliance on *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698 is misplaced. The *Exxess Electronixx* holding was that a contractual attorney fee provision did not authorize an award of fees on tort claims when the clause was applied only to actions "to enforce the terms hereof or declare rights hereunder" (*Id.* at pp. 702-703, 706-713.) That clause was "quite narrow." (*Id.* at p. 712.) This clause is quite broad. Different wording produces different results.

Cheung also argues the trial court erred in ruling that Tong was the "successful party" under the contractual attorney fee provision. When a contract provides for an attorney fee award to the prevailing party in litigation on both contract and noncontract causes of action and does not define the term "prevailing party," the trial court may determine the prevailing party based on a pragmatic assessment of the extent to which each party achieved its litigation objectives. "If the attorney fee provision does encompass noncontractual claims, the prevailing party entitled to recover fees normally will be the party whose net recovery is greater, in the sense of most accomplishing its litigation objectives, whether or not that party prevailed on a contract cause of action." (*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 992.)

The jury awarded Tong more than it awarded Cheung. The trial court reasonably found that Tong was the "successful party"

and Cheung was the “unsuccessful party.” There was no error or abuse of discretion.

Cheung incorrectly asks this court to limit his liability to Tong to Cheung’s equity in the property at issue. In support, Cheung excerpts section 27.17 of the lease, which limits the tenant to the landlord’s equity in the event of any breach by landlord “of any terms, conditions, and covenants of this Lease” Tong correctly responds his claims against Cheung were based on tort and not the lease and therefore this section does not apply.

DISPOSITION

The judgment and order awarding attorney fees are affirmed. Tong is entitled to costs on appeal.

WILEY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned to Division Seven, by the Chief Justice pursuant to article VI, section 6 of the California Constitution.